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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CARMINE G. DE SAPIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Carmine G. DeSapio, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated February 25, 1972 which affirmed a denial of Petitioner's motion for a new trial upon the grounds of newly discovered and suppressed evidence.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in Appendix B of this petition (33a-47a).

The opinion of the District Court is not reported and is set forth in Appendix C of this petition (48a-56a).

The opinion of the Court of Appeals upon the Petitioner's direct appeal from the judgment of conviction is reported under the title, *United States* v. *DeSapio*, 435 F.2d 272,

cert. den., 402 U.S. 999 (1971), *rehearing den.*, 403 U.S. 941 (1971). It is set forth in Appendix A of this petition (1a-32a).

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional, Statutory and Regulatory Provisions Involved

(1) The Fifth and Sixth Amendments to the United States Constitution.

(2) 18 U.S.C. §§ 371, 1951 and 1952.

(3) Rule 33 of the Federal Rules of Criminal Procedure.

These provisions are set forth in Appendix D to this petition.

Questions Presented

Itkin was an indispensable government witness at the Petitioner's trial. Thereafter, while testifying for the government at other criminal trials and in closed proceedings, Itkin revealed that:

A. At the direction of the Government or with the government's acquiescence, he had perjured himself and suborned perjury on numerous occasions for the purpose of protecting his undercover relationship with the government.

B. His relationship with the government, as well as the benefits he derived therefrom, were far more extensive than were revealed at the Petitioner's trial.

Based upon these sworn admissions, the Petitioner moved for a new trial upon the grounds that (a) the government had suppressed this evidence at the time of trial, and (b) even absent suppression, due process and the interest of justice required a new trial since Itkin's credibility and his status had been the decisive factors in the jury's determination. The Petitioner also requested a hearing in aid of his motion.

Although the government did not deny the allegations as to Itkin's perjuries, and merely sought to minimize the significance of the allegations as to Itkin's status, the District Court denied the motion without a hearing.

The questions presented for review are:

1. May the defense in a criminal case, as a matter of right, impeach a prosecution witness by eliciting from him that he has, with the complicity of the Government, perjured himself and suborned perjury for the purpose of securing a governmental objective, as to facts unrelated to the operative facts of the case on trial?

2. Were the due process standards of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Mesarosh* v. *United States*, 352 U.S. 1 (1956), violated when the Government failed to disclose, at the time of trial, its knowledge of Itkin's perjuries and of the government's complicity in those perjuries?

3. Where the jury has been instructed that it must find as a fact that the chief government witness was a co-conspirator, rather than a government agent, before his acts and out-of-court statements may be attributed to the defendant, was the government's failure to reveal to the defense a substantial amount of information concerning the scope of Itkin's relationship with the government and the extent of the benefits that he derived therefrom, violative of constitutional due process?

4. To the degree that the Courts below relied upon speculation for the conclusion that some of the newly discovered evidence had been known to or was available to the defense at the time of trial, was it error to deny a hearing as to that issue?

5. In view of the substantial disclosures obtained by the defense, through the indirect means of examining transcripts of other trials, was it error for the Courts below to deny the Petitioner a hearing for the purpose of examining Itkin and his government contacts to determine the true extent of: a) his total relationship with the United States Government at the time of the events of this case; b) the nature of the relationship between the CIA and the FBI as to their contemporaneous shared use of Itkin, and c) the truth of Itkin's assertions as to the government's complicity in his perjuries?

Statement of the Case

1. Abbreviations used on this Petition

The following abbreviations are used in this petition:

"a"—The opinions and statutes which are set forth in the appendices of this petition.

"M."—The bound volume of pleadings and proceedings in the District Court upon the motion for a new trial. Copies of this volume were filed in the Court of Appeals.

"Tr."—Transcript of the Petitioner's trial.

In support of the motion for a new trial, two bound volumes of exhibits were filed with the District Court, and, thereafter, filed in the Court of Appeals. *Inter alia*, these exhibits contain extracts of testimony given at trials in which Herbert Itkin testified subsequent to the Petitioner's trial. These extracts retain the pagination of the trial transcripts from which they were taken. Citation to these extracts are by an abbreviated reference to the title of the case, followed by the page of the original transcript:

"*McCarthy*": *United States* v. *McCarthy* (Docket No. 68 Cr. 467—S.D.N.Y.—1970)

"*Amato*": *United States* v. *Amato* (Docket No. 69 Cr. 569—S.D.N.Y.—1970)

"*New York ex rel. Itkin*": *New York ex rel. Itkin* v. *Hirsch* (Index No. 4590/1970—N.Y. Sup. Ct., Westchester Co.—1970)

"*Zulferino*": *United States* v. *Zulferino* (Docket No. 68 Cr. 546—S.D.N.Y.—1971)

"*Phonographic Equipment*": *Phonographic Equipment Co. Ltd. & Ors.* v. *Associated Newspapers, Ltd.* (High Court of Justice, QB Division—1971)

"*Lipkins*": *United States* v. *Lipkins* (Docket No. 71 Cr. 829—S.D.N.Y.—1971)

Counsel for the Petitioner has requested that the Clerk of the Court of Appeals certify copies of all these documents to this Court.

2. History of Proceedings

After a trial by jury, in the United States District Court for the Southern District of New York, petitioner was found guilty upon three counts of the indictment, which charged:

1. Conspiracy (18 U.S.C. § 371);
2. Unlawful travel in interstate commerce (18 U.S.C. §§ 1952 & 2);
3. Unlawful use of the telephone in interstate commerce (18 U.S.C. §§ 1952 & 2).

On February 10, 1970, after denying a motion for a new trial,* the District Court sentenced the petitioner to concur-

* The pre-sentence motion for a new trial was made upon facts and grounds unrelated to those presented by the proceedings now before this Court for review, see *United States* v. *DeSapio*, 435 F. 2d 272, 285-288 [26a-29a] (2nd Cir., 1970).

rent terms of two years imprisonment on each count, and further ordered that he pay a fine of $4,500.

The Court of Appeals affirmed the judgment of conviction in an opinion on November 16, 1970 (435 F.2d 272)* [1a]. On May 24, 1971, this Court denied certiorari (402 U.S. 999, *rehearing den.*, 403 U.S. 941); Justices Douglas and Stewart dissented from the denial of certiorari. Justice White did not participate in the consideration or determination of the Petition.

On June 25, 1971, Petitioner commenced service of his sentence. He remains in custody at the time of the filing of this Petition.

On October 27, 1971, Petitioner moved in the District Court for a new trial upon the ground that the prosecution had suppressed evidence of material importance to the defense, and upon the further ground that the defense had discovered evidence which required a new trial, pursuant to F.R. Crim. P., 33, and elemental standards of due process.

The motion was supported by the affidavit of counsel, detailing the facts upon which a new trial was sought (M. 19-69), and by the affidavit of Petitioner's trial counsel, stating that the evidence had not been known to the defense at the time of trial (M. 70).

Also submitted as an exhibit upon the motion was a volume containing, *inter alia*, extracts from various judicial proceedings in which Herbert Itkin, the chief government witness, had testified since the date of his testimony at Petitioner's trial (see pp. 4-5, *supra*).

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* Rehearing and rehearing *en banc* were denied on December 28, 1970.

The government opposed the motion through the affidavit of an Assistant United States Attorney who did not purport to have any knowledge as to the truth or falsity of Itkin's sworn admissions upon which the motion was predicated (M. 74-92). A reply affidavit was thereafter submitted by Petitioner's counsel (M. 93-115). The District Court permitted the New York Civil Liberties Union to file a statement *amicus curiae* (M. 211).

The motion came on to be heard on December 6, 1971, and the Court reserved decision (M. 212).

On December 13, 1971, the District Court, in an opinion, denied the motion in all respects, and declined to grant the Petitioner a hearing (48a-56a). The Court of Appeals opinion affirming the judgment of the District Court was filed on February 25, 1972 (33a-47a).

3. Itkin's evidence against Petitioner

The Court of Appeals considered Petitioner's direct appeal on the basis that "the case was a close one and that, in consequence, errors that might be regarded as non-prejudicial in an open-and-shut trial would be grounds for reversal here" (13a).

The trial evidence has been reviewed by the Court of Appeals (3a-14a), and will not be detailed here. Since the Courts below have disputed the admissibility, materiality and "newness" of the newly discovered, suppressed evidence, all of which relates to Itkin's credibility and status, we will address ourselves to those aspects of the trial proof.

The indictment charged that Petitioner had conspired with Herbert Itkin, James Marcus, Antonio Corallo and Henry Fried to bribe Marcus, then Commissioner of the New York City Department of Water Supply, Gas & Electricity, to withhold permits sought by Consolidated Edison Company of New York until Con Ed would agree to reward construction contracts to Fried's companies (2a).

A. Itkin's Credibility

Herbert Itkin's testimony was essential to establish the Petitioner's alleged *criminal involvement* and to establish the jurisdictional prerequisites of interstate travel and interstate telephone communication. If Itkin had not testified or if the jury had not believed him, Petitioner could not have been convicted.*

At trial, Itkin's background posed a unique obstacle to the efforts of defense counsel in their attempt to impeach his credibility. While steadfastly adhering to the claim that his ultimate goal was a patriotic one, he readily admitted to a career of bribery, kickbacks and double dealing. He wore his crimes as so many medals awarded to him in his campaign against crime.**

The only appropriate means by which Itkin could have been effectively impeached would have been to establish that, under the direction and approval of his governmental sponsors, he perverted the very judicial processes which both claimed were the ultimate objective of their conduct. It is precisely that type of proof which was unavailable to the de-

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* The remainder of the government's evidence breaks down into four categories of proof: (1) that a conspiracy existed (testimony of Marcus, Hadden Ulrich and Crawford); 2) that Corallo was a member of the conspiracy (testimony of Marcus and tape recordings of conversations between Itkin, Marcus and Corallo); 3) that Itkin and Fried had made extrajudicial statements implicating Petitioner (testimony of Marcus and Crawford and tape recordings of conversations between Itkin, Marcus and Corallo); and 4) that Petitioner offered, without a suggestion of compensation, to assist Con Ed and the City in resolving their differences (testimony of Ulrich and Hadden). Hadden, Ulrich and Crawford were Con Ed executives.

** "Award" is perhaps a most appropriate description, since, as found by the Court of Appeals, the government permitted Itkin to engage in his criminal conduct (16a-18a).

fense at trial, but which was discovered in testimony given by Itkin at trials which followed that of the Petitioner.

The newly discovered evidence established, by Itkin's sworn admissions, that he had perjured himself and had suborned perjury in Federal, State, and foreign courts, mainly at the direction of the United States Government, for the purpose of protecting the secrecy of his relationship with the government. The thrust, then, is Itkin's willingness to lie under oath in the service of his governmental objective, and the willingness of his government superiors to have him do so.

In testimony given prior to the Petitioner's trial, Itkin categorically denied ever having committed perjury:

> "Q. Did you ever commit perjury? A. No.
>
> "Q. Did you ever assist anyone to commit perjury? A. Not at all." *United States* v. *Corallo,* 67 Cr. 1050 (S.D.N.Y., 1968) at p. 1260.

i) Itkin's Repeated Perjuries in State and Foreign Courts

From March, 1965 until March, 1971, Itkin and his wife were engaged in protracted litigation against her prior husband for custody of the children of her prior marriage. The litigation arose from the fact that in March, 1965, Mrs. Itkin took the children to England in violation of a New York Supreme Court order. Over the following six years, twenty-seven orders were issued by at least fifteen different judges of State, Federal and English Courts. The matter was finally terminated in the last of these proceedings in which the New York Supreme Court, Westchester County, awarded permanent custody to the childrens' father.*

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* A copy of the Court's opinion is included in the volume of exhibits which was filed with the District Court in support of this motion for a new trial. It sets forth in detail the history of the proceedings (see also, M. 36-39).

The testimony taken in this last proceeding had been sealed and was not made public until May 13, 1971, when it was concluded by the Court that: ". . . if our national security is bound up in a person of Itkin's character, and the testimony he gave at this trial, then our country is indeed in serious trouble" (Opinion of McCullough, J., p. 3). This opened a whole new chapter of revelations as to Itkin's willingness to deceive the courts for what he and his government superiors considered the higher purpose of protecting his governmental mission—his "cover".

In the Westchester proceeding, Itkin admitted under oath that in the preceding State and English proceedings, at the direction of the CIA, he perjured himself and suborned his wife to commit perjury. He now asserts that by virtue of his foreign assignment for the CIA, his wife was made to move to England with the children so as to better assist him in establishing a cover. He admits that, to prevent her prior husband from recovering the children, he and his wife commenced a perjurious ward-of-court proceeding in the English courts at the instigation of and under the continued supervision of the CIA; that he and the CIA suborned his wife to commit perjury in the English courts, and that he, himself, lied "right and left" in the English proceedings. He has also sworn that he and the CIA persuaded his wife to agree to all of the foregoing unethical conduct by representing to her that the English Courts would be advised, *ex parte*, of the true facts.

Itkin admitted under oath that, during the protracted history of the custody battle, he had perjured himself and had suborned his wife to commit perjury at the direction of the CIA for the purpose of concealing his CIA cover. These perjuries were committed in the English Courts and in the Westchester Family Court and the New York Supreme Court (*New York ex rel Itkin*, 1717,1734, 1749-1757, 1870-1873; 1882-1889, 1944, 2028; *Lipkins*, 237).

Itkin's explanation for failing to reveal this information when he was asked about perjury and subornation of perjury at the *Corallo* trial (*supra*, p. 9), is that he did not fully understand the question (*Lipkins*, 230). He asserts, without contradiction, that he subsequently realized his mistake and brought it to the attention of the government attorneys:

> "A. Then I brought to their [the United States Attorneys] attention that while I was undercover in England and in a custody case with my wife and her children, I told her to say that we had come to England for other purposes than the CIA, and I had to do this, so we developed a cover story.
>
> "Q. Who developed a cover story? A. The CIA and I."

The prosecutors, in turn, did *not* reveal it to petitioner's counsel.

ii) Itkin's Perjurious Trust Agreement

In October, 1965, Itkin executed an "agreement and declaration of trust" for the benefit of his alleged creditors. The agreement was executed under penalty of perjury, and was also signed by one Mario Brod, as trustee, and by certain of Itkin's alleged creditors. In that document, Itkin swore that he was actually indebted to the listed creditors for a total of $435,000, that his temporary financial embarrassment was due to legitimate personal expenses, and that he had transported his second wife and two children to England for the sole purpose of reducing his expenses (The trust agreement is set forth in the volume of exhibits filed with the District Court upon Petitioner's motion for a new trial).

At the Petitioner's trial, Itkin was questioned about this document.

Since our interpretation of his testimony differs from that of the District Court and the District Court's interpretation differs from that of the Court of Appeals, we have set forth the controversial portion of his testimony in the margin.*

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* [Cross-examination by defense counsel]

"Q. Mr. Itkin, you told us yesterday that in 1965 you owed approximately $400,000; is that right? A. I said a list was prepared indicating that. I believe that is what I said.

"Q. Well, did you owe $400—some odd thousand? A. No, I did not, sir.

"Q. You say that in 1965 you didn't owe $435,000? A. I said I prepared a list—

"Q. No. I asked you, sir, the direct question and I would like a direct answer. A. I did not actually owe $400,000.

[Trust agreement marked for identification]

"Q. I show you this paper and ask you if this is a copy of a trust agreement you executed on the 22nd day of October, 1965 (handing)? A. Yes, it is, sir.

"Q. And in that agreement did you say that the statements made by you and the representations made by you in this agreement were made under the penalties of perjury? A. That's right.

"Q. Were you referred to in this agreement as the donor, d-o-n-o-r? A. Yes, sir, I was.

"Q. Did you represent in this agreement that your liabilities are approximately $435,000? A. Yes, I did, sir.

"Q. Do you say now to this jury that wasn't true? A. That is not what I said.

"Q. Well I ask you the direct question again: When you executed this agreement in 1965, did you owe to creditors $435,000? Yes or no? A. I can't answer that yes or no, I can explain it.

"Q. No, I don't want an explanation. You just answer the questions. A. I cannot answer that.

"Q. Mr. Rooney will have an opportunity on redirect" (Tr. 678-680).

We respectfully submit that Itkin merely equivocated as to whether the true total of his debts was that which was recorded in the trust agreement. In its opinion, the District Court found it "difficult to assume" that defense counsel "did not believe the document may have contained false statements—otherwise, it can scarcely be understood why he wished to delve into the matter" (50a). The Court of Appeals reads the same testimony as showing that Itkin "admitted that he didn't owe the more than $400,000 in debts listed in the document which he had attested to be true" and faults defense counsel for not having permitted Itkin to offer an explanation (41a).

If the only issue was whether the list was completely accurate, the matter could be laid to rest as being a reasonable difference of opinion. However, that is far from the case. Since the petitioner's trial, Itkin has testified that only ten percent (*Lipkins*, 251) of the debts on the list were true debts; that the others were added to the list for the purpose of protecting his cover for the FBI and the CIA (*McCarthy*, 642-652, 1023-1027; *New York ex rel Itkin*, 1880-1881); that the commission of this perjury and fraud was supervised by his CIA superior, Mario Brod, who acted in the dual roles of trustee (*New York ex rel Itkin*, 2049-2054), and attorney (*McCarthy*, 863-864) for Itkin; and that Brod prepared the perjurious lists (*McCarthy*, 1023-1025), "directed" and "ordered" Itkin to sign the false affidavits (*McCarthy*, 447; *Lipkins*, 243-253); and went so far as fraudulently to sign Itkin's name to an affidavit (*McCarthy*, 643-644).

The extent of the plot and its true purpose—to protect Itkin's cover—is set forth in *Lipkins* at 243-253.

Significantly, while focusing upon the interpretation that Itkin, during Petitioner's trial, admitted the list to be false, the Court of Appeals omits any reference to Petitioner's actual argument:

> "What was not known was that: 1) Brod [Itkin's CIA superior] instructed Itkin to execute the agreement; 2) the scheme was for the purpose of protecting Itkin's cover, and 3) the statements of fact contained in the document were knowingly false on the part of Itkin and Brod" (Petitioner's Brief in the Court of Appeals, p. 17).

The undisputed fact is that the government knew all of this and did not advise the defense.

B. Itkin's Perjury in Federal Court

In testimony given by Itkin at trials subsequent to the Petitioner's trial, it was learned for the first time that in 1964 and 1965 he had been called as a witness in Federal bankruptcy proceedings involving a certain Sire Plan (*Lipkins*, 233-236; *Zulferino*, 76). Itkin has now admitted that he committed perjury at both hearings (*Lipkins*, 234-235); he did so to protect his cover for the government (*Zulferino*, 34-35, 76-77; *Lipkins*, 235-236); that the FBI told him if he blew his cover he would be killed (*Amato*, 670); and the FBI was informed of his perjurious testimony within a day or two after it was given at the first hearing and before the second hearing (*McCarthy*, 928, 1125-27; *Amato*, 660-661).

The breadth of Itkin's perjury in connection with the Sire Plan was such that he, himself, has characterized it as having "lied constantly" (*McCarthy*, 1027-28, 1126-27). When asked how he reconciled this now admitted perjury with the denials he gave at the Corallo trial (*supra*, p. 9), Itkin swore that after the Corallo trial was over, he realized he had made a "mistake" in not revealing the Sire Plan perjury and he brought this fact to the attention of the government (*Lipkins*, 234). It was not revealed to petitioner's counsel.

At the Petitioner's trial, mention was made on cross-examination concerning the Sire Plan—*but not concerning the Sire Plan bankruptcy proceedings*. Itkin's full testimony in this regard is set forth in the margin.*

There is no indication whatsoever that defense counsel had been aware of the fact that Itkin had testified in any proceeding concerning the Sire Plan, much less that he had perjured himself and that the FBI knew of it. As with many of his other illegal deals, Itkin was merely questioned by the defense as to whether he had received a kickback in return for having obtained financing for the plan.

C. Itkin's Subornation of Marcus' State Grand Jury Testimony

In December, 1967, Marcus was called before a New York County Grand Jury and perjured himself as to his involvement with Itkin in selling the powers of his office. On June 21, 1968, Itkin was indicted by the New York County Grand Jury upon the charge of suborning Marcus' perjury. The case has been removed to the United States District Court for the Southern District of New York, and has not yet been brought to trial. In the interim, Marcus

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* "Q. Are you familiar with the Sire Plan? A. Yes, I am.

"Q. In connection with the Sire Plan, did you obtain any monies from the Sire Plan? A. Yes, I did.

"Q. Was that with respect to your financing or obtaining financing for the Sire Plan? A. Yes, sir, it was.

"Q. Did you make a payment to the Teamsters or some Teamster officials? A. Yes, I did.

"Q. Did you receive part of that as a kickback? A. Yes, I did, sir.

"Q. Any of this money ever turned over to the FBI? A. Some of it was.

"Q. How much was it and when? A. But they didn't keep it. I turned some over and they made photographs of it——

"Q. And gave it back to you? A. I insisted that they did" (Tr. 1126-27).

has pleaded guilty to the perjury and has served a term of imprisonment for it.

At the Petitioner's trial, the defense was prohibited from questioning Itkin as to whether he had actually suborned Marcus to commit perjury. Since the trial, independent evidence has been discovered which would enable the defense to establish (a) that Itkin did, in fact, suborn Marcus' testimony, and (b) that Itkin has perjured himself in denying such subornation, both by affidavit and in other trial testimony.

Aside from the general issue of credibility, the subornation in question was particularly relevant to the present case. The subject matter of the suborned testimony involved individuals (Marcus, Corallo and Itkin) and events (the Jerome Park bribery-conspiracy) which formed part of the government's proof at the Petitioner's trial (3a, 14a-15a). Moreover, the subornation occurred at a point in time when Itkin was allegedly telling the truth to the authorities and had allegedly ceased to act independently of them (12a, 16a-17a).

In *McCarthy*, at pp. 740-746, Itkin acknowledged that on the evening before Marcus was to testify in the Grand Jury, he and Marcus met at the Garden Cafe on East 15th Street in Manhattan. Having elicited this information, defense counsel in *McCarthy* was made to give an offer of proof at the side bar relative to this line of questioning. He stated as follows:

> "I intend to show that on that night • • • he [Itkin] instructed Mr. Marcus in giving false testimony before the Grand Jury. I intend to show that there were two detectives from Mr. Hogan's [District Attorney of New York County] office at the Bar who overheard this and he was then indicted for perjury • • • "

The trial Judge in *McCarthy* (who was also the trial Judge at the Petitioner's trial), precluded defense counsel from going into the details of the meeting and would only permit Itkin to be asked whether he was indicted for perjury.

During the *Lipkins* trial, it was confirmed that the Itkin-Marcus meeting at the Garden Cafe had been observed by detectives of the New York County District Attorney's office (*Lipkins*, 785).

Petitioner does not claim any suppression of evidence by the government in relation to Itkin's subornation of Marcus to commit perjury. Petitioner's claim is that there are two living witnesses, under the control of the New York County District Attorney's office, who, if subpoenaed to testify, establish that Itkin sought to falsify evidence concerning his relationship with the principals involved in the instant conspiracy, and this was at the same time that he was reporting to Federal agents that the Petitioner was involved in the conspiracy.

D. The Extent of Itkin's Relationship with the Government and the Benefits He Derived Therefrom

Herbert Itkin's status was crucial to the government's case. One of the defense contentions was that Itkin had not been a true conspirator, but rather had been acting under the auspices and authority of the Federal government with the purpose of gathering evidence of crime. If established, this would have required the exclusion of Marcus' testimony concerning narrations by Itkin. Moreover, the Federal jurisdictional acts, which were performed by Itkin, would not have been attributable to the Petitioner. That is made clear in the opinion of the Court of Appeals upon the direct appeal of this case (19a).

Indeed, the Court's charge instructed the jury that if Itkin was, in fact, an agent and not a true co-conspirator,

then his acts and statements could not be attributed to the defendant under the conspiracy theory (Tr. 2676-2680; 2697).

In order to comprehend the astonishing nature of the newly discovered, suppressed evidence, a review of the trial proceedings as to this issue is essential. At trial, the defense was faced with the problem that its only source of information as to the nature of Itkin's relationship with the government, was Itkin, himself, and his Government superiors. Their interest in ascribing a non-governmental character to Itkin's activities is apparent. In addition, the trial Court precluded the defense from adducing evidence concerning Itkin's relationship with the Central Intelligence Agency. Indeed, any mention of the CIA was prohibited (Tr. 349-50, 483, 525, 683-89, 1081-83).

Itkin's testimony in this case leaves little doubt that the impression he created for the jury was that his sole governmental allegiance was to the FBI.

Making allowance for its partisan tone, the Government's brief in the Court of Appeals, at the time of the direct appeal from the judgment of conviction, presents a fairly accurate picture of Itkin's relationship with the government as it was permitted to be known to the defense and to the jury:

> "Itkin was introduced to the FBI by an unidentified government agent in March, 1963. Itkin volunteered without promise of reward to supply information on a confidential basis on various persons in whom the FBI was interested. For the next five years, until he went into 'custody' in early 1968 (Tr. 1158-60, 1165), Itkin maintained constant contact with the FBI, normally through fleeting meetings in public places, sometimes as often as daily. The FBI's role was purely passive. They did not assist Itkin in any way, nor did they direct him to investigate any-

> thing in particular. They simply listened to what he had to say. From time to time, Itkin would report that he himself had committed a crime, but usually after the fact. Although FBI agents obviously do not keep money that comes into their possession during the course of an investigation, Itkin did keep whatever money he succeeded in obtaining illegally. Itkin was cautioned 'quite clearly' that the FBI could not 'condone' his criminal activities or insulate him from prosecution; but the FBI did not arrest him or stop listening to his reports because he was supplying a 'tremendous' amount of information on major criminals (Tr. 1792-9, 1812, 1859-60, 1862-6, 1873-4, 1876)" (Government's brief, pp. 883-84).

There is hardly a sentence or phrase of the above noted passage which does not conflict with the newly discovered evidence.*

Thus, in *Phonographic Equipment*, Itkin disclosed: that he is a CIA "employee"; that the CIA originally gave him his assignment to infiltrate organized crime, and that in March, 1963, "my superior in the CIA brought me to the FBI and asked me if I would work for both agencies from that point on." His CIA assignments took precedence over his FBI assignments, however the two agencies accommo-

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* The government's position as to the necessity for secrecy concerning the existence and nature of Itkin's relationship with the CIA appears to vary depending upon the value which the revelation of this information, to a court and jury, *has for the government*. Although counsel for petitioner was thoroughly precluded from eliciting information concerning Itkin's CIA activities, the government in later proceedings has elicited the fact of Itkin's employment by the CIA (e.g., *McCarthy*, 1023-1024). Itkin has adopted a similar approach (*New York ex rel Itkin*, 1710, 1727, 1942, 2008, 2032). Compare Itkin's relatively free discussion of his CIA relationship in *Phonographic Equipment*, (July 7, 1971, pp. 41-42, 48-49, 51; July 8, 1971, pp. 11-12, 17-19, 28, 33-34, 38, 62), with his invokation of Executive Privilege in *Lipkins*, p. 222, during his testimony less than a month later.

dated each other. Thus, when the CIA told him to move his family to England, ". . . it was . . . decided by the FBI that whilst over here (England) I should try to find out as much as I could about American gangster infiltration." Similarly, certain of his relationships with criminals were jointly supervised by both the FBI and the CIA. He was paid by the CIA and he expects "to retire" in two years, because "then I'll have twenty years of service, counting my army time, that will give me twenty years of service" (*Phonographic Equipment*, Vol. I., pp. 42, 48; Vol. II, pp. 8, 11, 33, 62, 66).

None of the above was known to the jury at Petitioner's trial which had the difficult task of assessing the nature of Itkin's relationship with the Government. None of it was known to the trial Judge, who upon motion of the government, precluded any inquiry concerning the CIA, ". . . because I don't consider them, frankly, relevant in any sense of the word in our case" (Tr. 483).

However, since the Petitioner's trial, the Government has seen fit to adduce from Itkin the fact that he was an undercover agent for the CIA, and that he had gone to England on a CIA mission in 1965 (*McCarthy*, 1023-4). Similarly, Itkin has since freely revealed his CIA relationship, the name of his CIA superior, the length of time that he was a CIA agent (from the mid-1950's until the termination of his "cover" in 1968), and the location of his CIA operations. He has also revealed that, under the supervision of his CIA superior, he swore his wife to secrecy by means of the National Security Oath, and he, himself, had much earlier been given the oath (*New York ex rel. Itkin*, 1717, 2008; *Lipkins*, 313-314).

In turn, the CIA provided Itkin with amounts as large as $10,000 (*New York ex rel Itkin*, 1732-4); saw fit to provide a CIA agent-lawyer, who fronted for Itkin, assisted him in fraudulently holding off his creditors, and even

ordered him to engage in the perjuries described *supra*, at pp. 9-15.

It is no wonder that Itkin can now testify that ". . . my first allegiance was to the CIA . . .", and that when he wished to make demands upon the FBI he would do so through the CIA (*Lipkins*, 377; *New York ex rel Itkin*, 2032).

These revelations, made only after Petitioner's trial, afford a key to Itkin's true relationship with the government. At trial, in attempting to plumb the nature of Itkin, the defense was confined to the limited area of Itkin's activities with the FBI. The missing pieces in the puzzle of Itkin's life tended to engender the conclusion of criminality, rather than government agency. The defense and the jury were not permitted to know that, in fact, Itkin was a CIA agent, who, when so ordered by the CIA, perjured himself, suborned perjury, infiltrated crime, worked for the FBI and stopped working for the FBI. His activities were characterized by CIA techniques (long term infiltration), rather than FBI techniques (investigation and short term undercover work). His criminal infiltration was a part of his CIA duties (*Lipkins*, 199).

The newly discovered evidence also provides a radically different picture of Itkin's relationship with the FBI.

From June, 1966 through June, 1967, Itkin did infiltration work for the FBI in England and the Dominican Republic for the purpose of uncovering foreign and domestic criminals. That infiltration involved a number of the persons who are prominent figures in the present case—Corallo, Marcus and Motto. Moreover, the FBI explicitly used Itkin as an agent provocateur by requesting that he introduce various alleged criminals to each other (*Lipkins*, 353a; Government Exhibit 2506a[1] in the *Lipkins* trial).

On the direct appeal, the Court of Appeals found a number of factors to be indicative of the proposition that Itkin was not a government agent (it must be remembered that the Court had none of the newly discovered evidence before it at that time). These apparent factors have been shown to be fallacious.

Thus, the Court of Appeals indicated that the Petitioner's case was the first instance in which Itkin had reported to the FBI contemporaneously with the commission of the crimes which formed the subject of his reports (16a). It has now been revealed that as early as June, 1963, Itkin was working so closely with the FBI that he was able to arrange for the FBI to observe an illegal transfer by him of $5,000 after the FBI had examined the money and searched his person so that the actual fact of the transfer would be established beyond any doubt (*McCarthy*, 429-432).

Moreover, the opinion of the Court of Appeals found support for the theory that Itkin was an independent agent in the fact that many of his reports to the government were incomplete (17a, 19a). We have now learned that his reports were incomplete because of the nature of the mandate which the government had given him. He was to apply CIA long-range infiltration techniques to his FBI assignment (*Zulferino*, 780; *Lipkins*, 202; *Phonographic Equipment*, July 8, 1971, 17-19). He was given specific instructions by the FBI to infiltrate particular organizations and obtain evidence concerning "specific individuals" (*New York ex rel Itkin*, 2033); his reports were purposely and necessarily incomplete, and secondary to his long-range assignment (*Amato*, 639; *Lipkins*, 222-228; *Phonographic Equipment*, July 8, 1971, 12, 18, 25, 56-57).

At the Petitioner's trial the District Court acknowledged that Itkin's financial relationship with the government was material to the issue of his status (Tr. 543). Similarly, the Court of Appeals, in its opinion on the direct appeal from

the judgment of conviction, emphasized the fact that Itkin did not turn illegally obtained monies over to the FBI and doubted "his eleemosynary intentions" (19a). Indeed, Itkin's FBI contact testified to that effect at the Petitioner's trial (Tr. 1809, 1863).

Itkin has since revealed the contrary to be true. In the *Zulferino* case, he testified as follows:

> "Q. Did you ever give the FBI any part of the illegal money that you received? A. They would not receive it.
>
> "Q. What? A. They would not take it.
>
> "Q. Did you offer it to them? A. Yes I did.
>
> "Q. They said they wouldn't take it. A. No, they couldn't get involved.
>
> "Q. They did not want to get involved, is that correct? A. That is right." (*Zulferino*, 40.)

Additionally, we now find that the Federal government has consented to give Itkin a tax deduction for all the monies he spent wheeling, dealing, grafting, bribing and extorting (*Zulferino*, 79; *Phonographic Equipment*, July 8, 1971, p. 29).

Finally, it has been made clear that the FBI went so far as to direct Itkin's misuse of funds which he held in escrow as an attorney. There came a time when, according to Itkin, it became necessary for him to utilize such funds for the purpose of continuing his illegal undercover operations. He has testified, without any contradiction from the FBI, as follows:

> "But at that point I notified the FBI and said I can't stay in it, I can't control the situation with these characters, and innocent people are getting hurt. I have to get out of the mortgage field absolutely now. I can't control these fellows any more. I have done as much infiltration as I can but I can't let this keep happening" (*McCarthy*, 671-672).

Reasons for Granting the Writ

This case presents substantial questions concerning the administration of justice in the Federal Courts, the standards of disclosure to which a defendant is entitled as a matter of due process of law, and the new trial requirements of Rule 33 of the Federal Rules of Criminal Procedure.

The use of agents-provocateurs is a central issue in contemporary discussion of police techniques. Herbert Itkin presents a case study for analysis of that issue. He has provided the Government with an excellent record of convictions; however, the government's encouragement, toleration of, and complicity in his illicit behavior, strike at the core of our basic concepts of civilized conduct. In utilizing Itkin for domestic criminal infiltration, the government has applied the classic espionage approach—and all that entails. The issue immediately before this court is whether that approach should stop at the Courthouse door. We respectfully submit that when a jury is asked to convict a citizen upon evidence produced by means of a Herbert Itkin, justice and fair play demand that the jury be fully informed as to the background and nature of the creature upon whose word it is being asked to convict.

1. A witness' past willingness to swear falsely is always of the highest materiality. His admissions of perjury may not be excluded from evidence upon the rationale that his character has been impeached by reference to other types of misconduct. In the present case, Itkin's perjuries were doubly significant since they demonstrated the nature of his relationship with the government and impeached not only Itkin, but also the evidence gathering technique of which he was a part.

On this motion for a new trial, the District Court was presented with three instances in which Itkin had committed one or more perjuries. Two of these were at the instigation of the government. One was with the acquiescence of the government. All of them were for the purpose of protecting his cover so as to further his infiltration. Following the Petitioner's trial, while testifying as a government witness, Itkin admitted all of these perjuries and the government's complicity therein. In no instance has the government repudiated his claims. The Court of Appeals has held that these specifications of perjury were immaterial to the Petitioner's guilt or innocence, and, therefore, do not warrant a new trial.

We submit that these perjuries were material in three respects:

a) the determination of the Petitioner's guilt or innocence was completely dependent upon Itkin's credibility;

b) revelation of the fact that the government had instigated, directed or acquiesced in Itkin's perjuries, would have enhanced the Petitioner's claim that Itkin was a government agent. Such a finding, would have eliminated as evidence the jurisdictional acts which were performed by Itkin, as well as his extrajudicial declarations which were purportedly made in furtherance of the conspiracy;

c) Itkin's willingness to commit perjury, as well as the government's willingness to permit or direct such perjury,

would have deprived the evidence gathering process, itself, of credibility.

Professor Wigmore has succinctly stated the applicable principals as follows (3rd Ed., Vol. IIIA):

> "Section 957. *Willingness to Swear Falsely.* A willingness to swear falsely is beyond any question, admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence:
>
> "1883 O'Neil, J. in *Anon.* 1 Hill S.C. 258:
>
> 'It was proved that Nimrod Mitchell had said that if he heard any man say he would not swear or lie, he would not believe him, for on some particular occasions *he* would, for he thought any man would. The substance of th s declaration was that he would not on some occasions, feel himself bound to declare the truth on oath . . . The man who believes that he is under no legal or moral obligation at all times and under all circumstances to tell the truth under the sanction of an oath has destroyed the only test by which he can claim credit at the hands of men. Such evidence is not establishing a bad character from particular facts.'"

It is clear that specific instances of conduct of a witness, even though not the subject of a conviction, are proper subjects of cross-examination "if clearly probative of truthfulness or untruthfulness and not remote in time" [*Proposed Rules of Evidence for the United States Courts and Magistrates* (March, 1971), Rule 608(b).]. *A fortiori*, this would be the case where, as here, the witness had admitted these perjuries to those who vouched for his credibility by using him as a witness and where, according to the witness, his sponsors had been accomplices in his perjury. See also, Wigmore, *supra*, Sections 958 and 959.

This court has repeatedly followed this reasoning. In *Napue* v. *Illinois*, 360 U.S. 264 (1959), it was held that:

> "The jury's estimate of the truthfulness and reliability of a government witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. at 269.

More recently, in unanimously reversing a judgment of the United States Court of Appeals for the Second Circuit, this Court said:

> *"Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case*, and evidence of any understanding or agreement as to a future prosecution *would be relevant to his credibility and the jury was entitled to know of it.*
>
> "For these reasons, the due process requirements enunciated in Napue and the other cases cited earlier, require a new trial and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion." *United States* v. *Giglio*, — U.S. — (February 24, 1972).

It has been widely recognized that cross-examination as to the "trait of veracity" and as to "a propensity to disregard the obligation of an oath" is always material to the trial of a criminal case, unlike other types of impeachment which go merely to the general character of a witness, *United States* v. *Provo*, 215 F.2d 531, 537 (2nd Cir., 1954). See also: *Simon* v. *United States*, 123 F.2d 80, 85 (4th Cir., 1941);

United States v. *Kubacki*, 237 F. Supp. 638 (E.D., Pa., 1965); *Lyda* v. *United States*, 321 F.2d 788 793 (9th Cir., 1963); *United States* v. *Segelman*, 83 F. Supp. 890, 893 (W.D. Pa., 1949).

This Court has held that previously undisclosed evidence of perjury by a government witness, where the witness was a professional informer, was so material to the integrity of the fact-finding process that a new trial was required, even if there had been no suppression by the prosecution (*Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Communist Party* v. *Subversive Activities Board*, 351 U.S. 115 (1956).

In *Mesarosh*, evidence of incidents of suspected perjury by the government witness (Mazzei) was discovered after the trial and conviction of the defendant.*

Nevertheless, it was held that a new trial was required in view of the fact that the confessed perjuror was a government informer and professional witness. Under such circumstances, "the integrity of a criminal trial in the Federal Courts" is involved (352 U.S. at 3).

Mesarosh had been convicted of violating the Smith Act and the general conspiracy statute (18 U.S.C. §§ 2385, 371), by conspiring to advocate the overthrow of the United States Government. After the conviction, the government itself came forward with the admission that Mazzei, a government informant and the chief witness against defendant at trial, *might*, have perjured himself in proceedings both before and after the conviction. Such possible perjuries

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* There was no contention that the evidence had been suppressed at the time of trial because (a) all but one of the incidents of suspected perjury by the government witness had occurred *after* the trial, and (b) the one pre-trial example of perjury had occurred in a State court proceeding of which the government concededly had no knowledge at the time of trial.

included testimony that he had falsely pleaded guilty to charges of adultery and bastardy because he was "induced to plead . . . but did so only in his official capacity (as a government informant) at the insistence of his superior in the FBI to avoid testifying" 352 U.S. at 5.

In directing a new trial (and rejecting the government's suggestion that the matter be remanded to the District Court for a determination as to whether a new trial was required), this Court held (352 U.S. at 9-11):

> "It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense *ordinarily* will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial.
>
> "Here we have an entirely different situation. The witness Mazzei was a paid informer of the government—he had been in its employ from 1942 to 1953 for the purpose of infiltrating the Communist Party and reporting the facts found. He testified in this case in that capacity, as a government witness. It is the government which now questions the credibility of its own witness because in other proceedings in the same field of activity, he gave certain testimony—some parts of it positively established as untrue, and other parts of it believed by the Solicitor General to be untrue. The Solicitor General conceded that without Mazzei's testimony in this case, the conviction of two of the petitioners cannot stand,

> *but he argued that as to the other three, Mazzei's evidence may not have had a substantial effect.* But the trial judge believed Mazzei's testimony was material against them for, over objection, he admitted it against all the defendants. There were only seven witnesses. Testimony of Mazzei, at least, gave flesh and blood reality to the mass of Communist literature read to the jury to show advocacy of violence by the Communist Party. This being so, it cannot be determined conclusively by any court that his testimony is insignificant in the general case against the defendants. Thus it has tainted the trial as to all petitioners" [emphasis added].

In the instant case (a) the perjury is not only clearly admitted by the government, but has been admitted by the witness itself (b) the newly discovered evidence bears not only on the witness' credibility but on two principal factual issues in the case—whether Itkin was a government agent and whether the government was implicated in his criminal activities, and (c) the evidence was never adduced by the government but was suppressed by the government at all stages of this case.

In view of these uncontested facts, the Court of Appeals' attempt to distinguish *Mesarosh* offends logic. True, the Government there questioned the credibility of its own witness. However, the basis for questioning Itkin's credibility is a matter of public record based upon his own sworn admissions of perjury. Since the Government, itself, was a party to some of that perjury, it hardly stands in a position to be the sole judge of whether the jury should have been informed of it.

2. The Petitioner was deprived of due process of law and of the right to the effective assistance of counsel, when the Government failed to disclose, at the time of trial, its knowledge of Itkin's perjuries and its own complicity in those perjuries.

While testifying as a Government witness, Itkin has stated that he revealed his perjuries in the custody proceedings and in his trust agreement to the United States Attorney's office (*supra*, pp. 11, 13-14). Similarly, he has testified that he revealed his perjury in the bankruptcy proceedings to the FBI within a day or two after having perjured himself (*supra*, p. 14).

The Government has never denied that Itkin perjured himself, that he did so under the circumstances and for the purposes he states, or that the United States Attorney's office was aware of all this at the Petitioner's trial. The failure of the Government to bring these facts to the attention of the Petitioner's counsel constituted a suppression of material evidence and requires a new trial.

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the basic rule governing the obligation of the prosecutor to disclose evidence to the defense is set forth as follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution" 373 U.S. at 87.

It is immaterial that the suppressed evidence goes only to the witness' credibility. *Napue* v. *Illinois*, 360 U.S. 264, 269-70 (1959); *United States* v. *Giglio*, — U.S. — (February 24, 1972).

In *Giglio*, this Court said:

> "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule."

Finally, the rationale of *Mesarosh* v. *United States*, *supra*, pp. 28-30, compels the conclusion that where a witness' perjury, in other matters, is known to the Government at the time of trial, it must reveal this information to the defense. *Mesarosh* devised a drastic remedy for a situation where the Government had been ignorant of the alleged perjury. Here that is not the case. The Government knew about it and failed to reveal it to the defense.

3. The Government suppressed evidence of material importance to the defense when it failed to reveal the many facts which have now been uncovered concerning Itkin's relationship with the Government.

We will not repeat here the massive amount of information which has now been uncovered concerning the nature and extent of Itkin's relationship with the Government. We respectfully refer the Court to our analysis *supra*, at pp. 8-23.

The Court of Appeals does not suggest, as it cannot, that any of this information was available to the defense at the time of trial. Rather, it is content to point to the fact that none of this evidence reveals that Itkin was specifically told by the Government to investigate the Petitioner or to infiltrate the highline venture (44a-45a).

We have never contended that we *know* of any specific direction by the CIA or the FBI for Itkin to target DeSapio or to investigate the City's dealings with Con Edison. Our point is that the newly discovered evidence of Itkin's relationship with these agencies is such as to leave no doubt

that he was their agent, and that he had the specific assignment of criminal infiltration on a long-term basis. The average policeman does not have any more of a particularized assignment. His job is to walk his beat and ferret out crime where he finds it. Itkin's job was to infiltrate where he could as the occasion presented itself.

The attempt to belittle the substance and effect of the newly discovered evidence, is to be compared with the District Court's charge on circumstantial evidence (Tr. 2656-2657) and conspiracy (Tr. 2673-2676). If facts analogous to those constituting the newly discovered evidence were proven against defendants charged with conspiracy, there is no doubt that a guilty verdict would be sustained. There is no reason why Itkin's relationship with the Government should be judged by any other standard.

In failing to reveal this information to the defense at the time of trial, the Government clearly violated the requirements of due process as set forth in *Brady* v. *Maryland*, 373 U.S. 83 (1963). There is no doubt that proof of Itkin's status as a Government agent would have deprived the Government of the jurisdictional acts upon which this prosecution was based. Since Itkin performed them, such proof would have rendered inadmissible his extrajudicial statements.

In *Crawford* v. *United States*, 212 U.S. 183 (1909), this Court held:

> "There is a presumption of harm arising from the existence of an error against the party complaining, excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such error against a party seeking to review it is not cause for reversal of the judgment." 212 U.S. at 203.

By the above standard, the Petitioner is clearly entitled to a new trial.

4. The Petitioner was entitled to an evidentiary hearing as to the facts which he sought to establish by the motion for a new trial.

The opinions of the Court of Appeals and of the District Court are laden with innuendo, casting unspecific doubt upon whether some of the evidence was, in fact, unknown to the defense at the time of trial, and as to whether Itkin's quoted testimony means what the Petitioner claims it means.

An evidentiary hearing would have been the only means by which these doubts could have been put to rest; however, such a hearing has been denied to the Petitioner based upon the proposition that ". . . the time for finality has come." (47a). We submit that this approach is unbecoming to the administration of justice in the Courts of the United States.

The wealth of material which was produced by the defense in support of the motion, and about which there can be no doubt the defense was uninformed at the time of trial, fully warrants an evidentiary hearing in which the air can be cleared and the true facts can become known. The aura of secrecy which has been imposed upon the nature and extent of the Government's relationship with Itkin is the element which will permanently deprive this case of any true finality. Censored truth as to material facts has no place in a Court of law.

For these reasons, we submit that the new trial standards of Rule 33, F.R. Crim. P., clearly require that a hearing be held.

Moreover, that aspect of the defendant's motion which alleges suppression of evidence by the United States is grounded upon the guarantees of the Fifth and Sixth Amendments of the Constitution. The following provision of 28 U.S.C. § 2255 is, therefore, controlling:

> "Unless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, *the court shall . . . grant a prompt hearing thereon* . . . * * *" [Emphasis added.]

In such circumstances, a defendant's rights to a hearing and to reversal do not turn upon the sufficiency of the evidence, but whether or not he has *prima facia* established that there has been an oppressive suppression of truth by the government. *Berger* v. *United States*, 295 U.S. 78 (1934); *United States* v. *Zbrowski*, 271 F.2d 661, 668 (2d Cir. 1959); *Napue* v. *Illinois*, 360 U.S. 264, 269-270 (1959).

The District Court cannot, by judicial clairvoyance, determine from affidavits alone that the new evidence concerning Itkin's credibility and status would not affect a jury's determination. It is noteworthy that in *Lipkins*, the only "Itkin prosecution" in which most of this evidence was used, the defendant was acquitted.

See: *Dunn* v. *United States*, 245 F.2d 407 (6th Cir., 1957); *Smith* v. *United States*, 259 F.2d 125 (9th Cir., 1958); *United States* v. *Derosier*, 229 F.2d 599 (3rd Cir., 1956); *James* v. *United States*, 175 F.2d 769 (5th Cir., 1949).

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted, the judgment of conviction should be reversed and a new trial should be granted; in the alternative, the case should be remanded to the District Court for an evidentiary hearing upon the issues presented.

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